APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FINAU F. MILA and ANAU S. FAINGA,
Plaintiffs-Appellees,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellant.

No. 80-2072

April 19, 1982

Rehearing Denied June 2, 1982

Jimmy Gurule, Washington, D.C. (James P. Morris, Crim. Div., Dept. of Justice, Washington, D.C., with him on the briefs), Attys., for defendant-appellant.

Charles B. Casper of Fabian & Clendenin, Salt Lake City, Utah, for plaintiffs-appellees.

Terry J. Helbush, San Francisco, Cal., filed an amicus curiae brief for the Immigration and Nationality Lawyers Association.

Before SETH, Chief Judge, and McKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

The government appeals from the district court's judgment that the Immigration and Naturalization Service (INS) incorrectly denied Anau S. Fainga preferential status as the sister of Finau F. Mila, a naturalized United States citizen, in qualifying for a permanent visa. *See* 8 U.S.C. § 1153(a)(5). Fainga, a native of the Kingdom of Tonga, was adopted by her mother's sister (Mila's mother) shortly after birth. Because Tongan law provides only for legal adoptions of children born illegitimately and Fainga was born legitimately, the adoption was according to Tongan custom. The INS interpreted the statute that defines "adopted children" as excluding Tongan children adopted by custom. The district court disagreed with the INS interpretation. The controlling issue on appeal is whether the district court gave too little deference to the INS interpretation.

To guide the INS in determining the order in which aliens subject to numerical quotas may become lawful permanent residents of the United States, Congress has set forth a system of priorities under which brothers and sisters of United States citizens are entitled to preferential treatment. *See* 8 U.S.C. § 1153(a)(5). To establish a brother-sister relationship, petitioner and the beneficiary of the preference must show they are "children" of a common parent as defined at 8 U.S.C. § 1101(b)(1). *Matter of Clahar*, 16 I & N Dec. 484, 485 (BIA 1978). Adopted children must meet the requirements of 8 U.S.C. § 1101(b)(1)(E):

> "(E) a child adopted while under the age of fourteen years if the child has thereafter been in the

> legal custody of, and has resided with, the adopting parent or parents for at least two years . . . ."

Petitioner has the burden of establishing that the purported adoption accords with the law of the country where it took place. *Matter of Garcia-Rodriguez*, 16 I & N Dec. 438, 439 (BIA 1978).

The INS district director does not dispute that Fainga was adopted by custom, but denied Mila's petition because Fainga's adoption was not a legal one. The Board of Immigration Appeals affirmed the district director's decision and dismissed Mila's appeal. On review the district court reversed and remanded, directing that Fainga be given preferential status because Tongan custom recognizes Fainga as the bona fide adopted daughter of Mila's mother. The district court held the INS requirement of legal adoption was unduly restrictive and misinterpreted congressional intent, declaring that so long as a bona fide parent-child relationship exists, the INS has no reason to distinguish between a country that provides for adoption by law and one that provides for adoption by custom.

A federal court may reverse an INS denial of a preferential visa petition only if the INS abused its discretion. The INS abuses its discretion if it bases its decision upon an improper understanding of the law. *Kalaski v. District Director of Immigration and Naturalization Service*, 620 F.2d 214, 216 n.1 (9th Cir. 1980). The Supreme Court has recognized that the construction of a statute by those charged with its administration is

entitled to substantial deference. *See, e.g., United States v. Rutherford,* 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 (1979). If reasonable and not contrary to the discernible intent of Congress, the agency's interpretation should be approved even though it is not the only reasonable interpretation or the one the reviewing court would make if deciding the issue in the first instance. *See Unemployment Compensation Comm'n v. Aragon,* 329 U.S. 143, 153-54, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946); *Nazareno v. Attorney General,* 512 F.2d 936, 939-40 (D.C. Cir. 1975).

The INS interprets 8 U.S.C. § 1101(b)(1)(E) as requiring an adoption to accord with the laws of the country where it allegedly occurred. *Matter of Garcia-Rodriguez,* 16 I & N Dec. 438, 439 (BIA 1978). If that country has a legal procedure for adoption, the INS insists that the petitioner prove the adoption met those requirements. *See Matter of Kong,* 15 I & N Dec. 224 (BIA 1975); *Matter of Kwik,* 13 I & N Dec. 89 (BIA 1968). If the country has no formal adoption system, the INS recognizes customary adoption, but only if that country's courts accept customary adoption as legally valid. The INS has recognized China's customary adoptions because China's legal system treats customarily adopted children as having rights equal in all respects to natural children. *See Matter of Kwok,* 14 I & N Dec. 127, 128-29 (BIA 1972). But if the country does not legally acknowledge customary adoption, the INS, at least since 1961, has refused to find an adoption valid for immigration purposes. *Matter of B,* 9 I & N Dec. 521 (BIA 1961); *accord, Matter of Palelei,* 16 I & N Dec.

716 (BIA 1979); *Matter of Benjamin*, 15 I & N Dec. 709 (BIA 1976); *Matter of Ashree, Ahmed and Ahmed*, 14 I & N Dec. 305 (BIA 1973).

The INS concluded that Tongan law does not recognize Tongan customary adoptions as legally valid and therefore denied Mila's petition, relying upon *Matter of Palelei*, 16 I & N Dec. 716 (BIA 1979), also involving a Tongan customary adoption. That decision relied on a letter of the Tongan Crown Solicitor stating:

> "There is no provision in our law for the adoption of children born legitimately. Nevertheless it has been a common practice in Tonga for relatives to raise and maintain children, including legitimate children as part of the family and to treat them in all respects as if they were legally adopted. Such 'adoption' does not give the child any legal right in the estate of the foster parent and is not recognized as legally valid under Tongan law."

Letter from Crown Solicitor of Tonga to American-British Law Division, Library of Congress (Jan. 16, 1978) (*quoted in Matter of Palelei*, 16 I & N Dec. at 718). The INS emphasis has continued to be upon proof of the relationship, stressing need for a court decree or "legal recognition" of the adoption.

Appellees contend that the INS overemphasizes inheritance rights, which is particularly inappropriate in the instant case since no adopted child, whether legally or customarily adopted, may inherit under Tongan law. *See* Tonga Const. § 111; Law of Tonga c. 63, § 76(ii)

(1967). Except for references by the dissent in *Matter of Kong*, 15 I & N Dec. 224, 226 (BIA 1975), we see in INS decisions no special emphasis upon inheritance rights of adopted children. *See Matter of Ng*, 14 I & N Dec. 135, 139 (BIA 1972) (customarily adopted daughter entitled to preferential status though Chinese law restricted inheritance to sons).

Although appellees can cite no authority holding Tongan customary adoptions legally valid, they maintain that Tongan customs are generally recognized in Tongan law. In support, they submit that in legal proceedings testimony of Tongan customs is admissible into evidence, Law of Tonga c. 13, §§ 5, 27 (1967), and that "assessors" sit with Tongan land courts to advise on customs relevant to disputes over land, Law of Tonga pt. IX, § 123. The amicus brief adds that in 1911, in the only reported Tongan case involving custody of a customarily adopted child, the adopting parents prevailed over a natural grandfather. Amicus Br. p. 18. But the single instance of a Tongan court awarding legal custody of a child to his customary adoptive parents rather that his natural grandfather does not negate the general rule stated by the Tongan Crown Solicitor. In spite of the general Tongan treatment of customs, Mila and Fainga do not claim that Tongan customary adoptions have the legal status under Tongan law required by the INS.

Furthermore, Mila and Fainga contend the INS interpretation of 8 U.S.C. § 1101(b)(1)(E) is unduly restrictive and thwarts the congressional intent of preserving the family unit by ignoring the genuineness of a

family relationship. We agree that a broader interpretation would recognize and help to preserve some families that suffer under the INS interpretation. We think the instant case is a close one on the law. Since more people seek to immigrate into the United States than are permitted by congressionally established quotas, the INS interpretation benefits families with legally adopted children. It has the practical advantages of decreasing the likelihood of fraud, serving as a relatively bright line to determine which adoptions will be recognized for immigration purposes, and insuring that persons who bring adopted children into this country are legally responsible for their care. The legislative history is not so clear that we can say the INS interpretation is wrong. The INS has expressed its view in opinions issued at least since 1961, *see Matter of B*, 9 I & N Dec. 521 (BIA 1961), and since that date Congress has amended 8 U.S.C. § 1101 many times without changing the definition of adopted children. Thus, we hold that while the INS interpretation is not the only reasonable one, it is a reasonable construction and the district court erred in failing to defer to it.

Because we have found reasonable the INS interpretation of 8 U.S.C. § 1101(b)(1)(E), and Mila and Fainga do not contend that Tongan customary adoptions meet the standard set by that interpretation, the INS did not abuse its discretion in denying the petition.

494 F.Supp 998. REVERSED.

McKAY, Circuit Judge, dissenting:

When Congress adopted 8 U.S.C. § 1101(b)(1)(E), I am satisfied that it mandated that the Immigration and Naturalization Service review foreign adoptions with an eye to preserving genuine family relationships. The Service itself recognizes that at least in some instances common law (customary) adoptions will satisfy the statute even though such adoptions exist outside an established formal adoption scheme. *Matter of Ng*, 14 I & N Dec. 135 (BIA 1972); *Matter of Yue*, 12 I & N Dec. 747 (BIA 1968). In this case the trial court correctly held that the Service ignored the statutory mandate in an attempt to establish something approximating a bright line test that places too much reliance on some formal juridical anglo-American notions of adoption and too little emphasis on whether the country recognizes these relationships as genuine family units.

The Service relies heavily on a letter of the Tongan Crown Solicitor for its proposition that Tongan law does not recognize customary adoptions as legally valid. This letter supports a more compelling proposition: that children customarily adopted in Tonga are treated exactly like natural children except with regard to inheritance rights. As the majority seems to recognize, preference status cannot and does not turn on inheritance rights because neither statutorily- nor customarily-adopted children in Tonga can inherit. The majority never says exactly what element or elements make for a "legally valid" adoption, but it seems to require some juridical act. The Service itself has rejected the notion that a juridical act is required for a legally valid adoption. *Matter of Kwok*, 14 I & N Dec. 127 (BIA 1972). Even if the test is

judicial acknowledgement, that test was met here since the only Tongan court ever to deal with the issue upheld the customarily-adopting parents' claim of custody over that of the natural grandfather. *In Re Lolesio,* 1 Tongan Law Report 14 (1911). In that case the Supreme Court of Tonga recognized that customary adoption gives the adoptive parents full legal custody and control over the child's upbringing to the same extent as any formal adoption. That opinion reads in its entirety as follows:

> An application for the custody of an illegitimate child (boy) aged 13½ years. When the child was 3 or 4 years old his mother gave him into the care of the applicant who thereafter cared for and looked after him, until he was taken away by one Kama the boy's grandfather, his father's father, shortly before the hearing. The boy's mother died when the boy was about 6 years old.
>
> HELD. The grandfather had no right to the custody and that the boy should be returned to the applicant.
>
> SKEEN, C. J. The boy is illegitimate and the mother has "pule." The father has no power, and therefore the grandfather has none. He has no succession rights under his father. The law does not recognize the father. The mother gave the boy to Soakimi (the applicant); he is the man who has control of the boy. The father has not given one penny, till the boy commences to get big he takes no notice of him. He is in the wrong. Order of the Court: Lolesio will return to Soakimi and will obey him in all things; if not Soakimi can punish him and Lolesio can complain to the Court if he is ill treated. Kama (grandfather) Paini and Mailau are warned to leave the boy alone. No fee charged.

Id.

The majority distinguishes Chinese customary adoptions, which are recognized by the Service, on the basis that Chinese law treats customarily-adopted children equally in all respects to natural children. In Tonga, it is true that customarily-adopted children are not treated exactly equally to natural children by reason of their lesser inheritance rights. The majority neglects the fact, however, that Tongan law does not even treat statutorily-adopted children equally to natural children because no adopted children in Tonga have inheritance rights (just as females, whether natural-born or adopted, have no inheritance rights under Chinese law). I can see no reason to discriminate between customarily-adopted children and statutorily-adopted children with regard to immigration status on this unprincipled basis. Accordingly, I would affirm the trial court's decision.

Order of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing in Banc

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
MAY TERM — June 2, 1982

FINAU F. MILA and ANAU S. FAINGA,
Plaintiffs-Appellees,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellant.

THE IMMIGRATION AND NATIONALITY LAWYERS ASSOCIATION,

Amicus Curiae.

No. 80-2072

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

This matter comes on for consideration of Appellees' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Judge McKay voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Chief Deputy Clerk

Opinion of the United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FINAU F. MILA and ANAU S. FAINGA,
Plaintiffs,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE
Defendant.

Civil No. C-79-0334

August 11, 1980

Charles B. Casper, Fabian & Clendenin, Salt Lake City, Utah, for plaintiffs.

Ronald L. Rencher, U.S. Atty., Wallace T. Boyack, Asst. U.S. Atty., Salt Lake City, Utah, for defendants.

MEMORANDUM DECISION AND ORDER

WINDER, District Judge.

This is a review of a decision of the Immigration and Naturalization Service ("Service") denying certain immigration benefits to plaintiffs.

The immigration of aliens to the United States is governed by the Immigration and Nationality Act

("Act"), 8 U.S.C. § 1101 *et seq.* The Act establishes a quota system limiting the number of immigrants in any given year. To determine which prospective immigrants will be given the limited number of available visas, 8 U.S.C. § 1153(a) creates six preference categories. Section 203(a)(5) of the Act, 8 U.S.C. § 1153(a)(5), confers fifth-preference status on the brothers and sisters of United States citizens.

Plaintiff Mila ("Petitioner") filed a visa petition with the Service seeking to have plaintiff Fainga ("Beneficiary") classified as an alien entitled to fifth-preference status, on the ground that Beneficiary is Petitioner's sister by adoption. The District Director denied the petition on the ground that Tonga, where the adoption took place, does not have a law providing for the adoption of legitimate children. The Board of Immigration Appeals ("BIA") affirmed, holding that if the civil law of a country does not recognize adoptions, no immigration benefits accrue under United States immigration laws based on adoptions alleged to have occurred in that country.

Because the law of Tonga does not provide for adoption of legitimate children, the BIA concluded that Petitioner could not establish that he and the Beneficiary once qualified as "children" of a common parent within the meaning of 8 U.S.C. § 1101(b)(1). Petitioner claims the requisite relationship exists by virtue of his mother's adoption of the Beneficiary. Petitioner asserts that the adoption was accomplished in accordance with 8 U.S.C. § 1101(b)(1)(E), which defines child as:

> [A] child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . .

The administrative record shows that the Beneficiary was adopted shortly after her birth by her natural mother's older sister. Thereafter she was raised as a member of her adopted mother's family, and hence a sister of the Petitioner. This practice is very common among the Tongan people. The record also reveals that Beneficiary's natural parents consented to the adoption and have renounced whatever rights they may have with respect to her. No question was raised in the administrative proceedings about the reality of the family relationship.

Plaintiffs claim that these facts establish an adoption under the BIA's own definition of "[v]oluntary acceptance of a child of other parents to be the same as one's own child." *Matter of Kwok*, 14 I. & N. Dec. 127, 130 (1972). Plaintiffs contend that the BIA's strict rule of recognizing an adoption only when it is affirmatively sanctioned by the local law, regardless of the nature of the local legal system or the local culture, is an erroneous interpretation of 8 U.S.C. § 1101(b)(1)(E) and goes against the intent of Congress to treat adopted children liberally in order to preserve genuine family units.

In determining the nature of the local legal system of Tonga, the court may consider any relevant material or source, pursuant to Rule 44.1, Fed.R.Civ.P. Plaintiffs have submitted the affidavit of Viliami Latu Tu'aki-

hekolo and other materials on Tongan law. Defendant has objected to this submission on the ground that the materials were not before the District Director and the BIA. Despite defendant's objection, the court finds that plaintiffs had no opportunity to submit materials on foreign law at the earlier administrative hearings. Therefore, the court will consider the materials submitted by plaintiffs on Tongan law, as well as the materials in the administrative record on Tongan law.

The Kingdom of Tonga is a group of approximately 150 islands in the South Pacific. Prior to 1845, the islands were governed by several local chiefs and were not subject to a central authority. In 1845, one of the chiefs, through a combination of military conquest and Christian conversion, brought the islands under his control and became known as King George Tupou I.

King Tupou was assisted in governing his newly unified kingdom by a number of English missionaries of the Methodist faith. One of the missionaries served as King Tupou's prime minister for many years and drafted a constitution designed to establish a system of law and government on the British model. Much of the impetus for a constitution lay in the fear that unless the Western powers that had forces in the area perceived the Tongan government as "civilized" by Western standards, they were likely to annex Tonga. The constitution was approved and became effective in 1875. Like the English constitution, the Tongan constitution omitted any reference to adoption.

Much of the Tongan legal system is quite different from pre-constitutional Tongan customs. However, where not inconsistent with the constitution or statutes, ancient customs continue to be observed. The Tongan courts enforce these customs on matters not specifically addressed in the constitution or statutes. The Tongan evidence code provides for the admission of evidence regarding customs. The Land Court, which hears all disputes involving land and noble titles, is advised by an "assessor," whose sole function is to sit with the court and advise it of Tongan customs.

For centuries, Tongans have practiced adoption, and the practice is a custom that antedates the constitution. Under the custom, a Tongan family will adopt a child (usually of a close relative) and will treat and raise the child just as a natural child. Customary adoptions are regarded by the community as creating a *bona fide parent-child relationship*. No provision of Tongan law authorizes the government to deprive the adoptive parents of custody of a child adopted in the customary way. If a child's natural parents give him up for adoption in the customary way, but later change their minds, they cannot obtain a court order or other governmental order compelling the child's return.

Given this background of Tongan history and law, it is clear to the court that under the undisputed facts of this case. Beneficiary qualifies under 8 U.S.C. § 1101(b)(1)(E), as "a child adopted while under the age of fourteen years" who has "been in the legal custody of, and has resided with, the adopting parent or parents

for at least two years." Having qualified under this section, Beneficiary is entitled to fifth-preference status under 8 U.S.C. § 1153(a)(5).

The court determines that the decisions of the District Director and BIA are unduly restrictive and misinterpret 8 U.S.C. § 1101(b)(1)(E). This court is of the opinion that if a *bona fide* parent-child relationship in fact exists, there is no reason to make a distinction between a society or legal system where such is sanctioned by law or where it is only recognized by custom. Where the clear legislative intent is to preserve the genuine family unit, the important inquiry must be to the reality of the relationship and not to the manner in which it arises.

Accordingly,

IT IS ORDERED that the decisions of the District Director and Board of Immigration Appeals are reversed and this case is remanded to the District Director to enter a finding that Beneficiary qualifies under 8 U.S.C. § 1153(a)(5) as a sister of a United States citizen and for further proceedings consistent with this decision.

A-19

Decision of the Board of Immigration Appeals

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

April 10, 1979

File: A21 605 489 - Salt Lake City

In re: ANAU SITAIA FAINGA, Beneficiary of visa petition filed by FINAU FATAFEHI MILA, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER:
Charles B. Casper, Esq.
Fabian & Clendenin
800 Continental Bank Bldg.
Salt Lake City, UT 84101

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

The petitioner applied for visa preference status for the beneficiary as his sister under section 203(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153 (a)(5). In a decision dated April 14, 1978, the District Director denied the petition. The petitioner has appealed. The appeal will be dismissed.

The petitioner, a United States citizen, native of Tonga, was born illegitimately on June 13, 1945, to Malakai Lavulo and Melenaite Mila. The beneficiary, a native and citizen of Tonga, was born legitimately on November 14, 1949, to Siale Hala and Seini Hala. Affidavits in the record reflect that the beneficiary was given immediately after birth to the petitioner's natural mother, the beneficiary's mother's older sister.

The District Director denied the petition on the ground that the law of Tonga does not provide for or recognize the adoption of legitimate children.

The respondent contends that the Immigration and Nationality Act does not require that an adoption create a legal status and that Tongan customary adoptions create family units which should be recognized under United States immigration laws.

In order to support a brother/sister relationship under section 203(a)(5) of the Act, a petitioner has to establish that he and the beneficiary once qualified as "children" of a common parent within the meaning of section 101(b)(1) and (2) of the Act. *Matter of Clahar*, Interim Decision 2643 (BIA 1978); *Matter of Gur*, Interim Decision 2560 (BIA 1977); *Matter of Rehman*, Interim Decision 2450 (BIA 1975); *Matter of Garner*, Interim Decision 2357 (BIA 1975); *Matter of Heung*, Interim Decision 2334 (BIA 1974). The petitioner claims the requisite relationship exists by virtue of his mother's adoption of the beneficiary. To establish his claim, the petitioner must prove that the adoption was

accomplished in accordance with 101(b)(1)(E) of the Act, which includes in the definition of child:

> [A] child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . .

This Board has consistently held that the question whether an adoption exists will be determined by reference to the law of the place where the purported adoption took place. *Matter of Garcia-Rodriguez,* Interim Decision 2630 (BIA 1978); *Matter of Dhillon,* Interim Decision 2620 (BIA 1977); *Matter of Benjamin,* Interim Decision 2505 (BIA 1976); *Matter of Park,* Interim Decision 2437 (BIA 1975); *Matter of Kwok,* 14 I&N Dec. 127 (BIA 1972); *Matter of Lau,* 10 I&N Dec. 597 (BIA 1964); and *Matter of R-,* 6 I&N Dec. 760 (BIA 1955). If the civil law of a country does not recognize adoptions, no immigration benefits accrue under United States immigration laws based on adoptions alleged to have occurred in that country. *Matter of Benjamin, supra.; Matter of Ashree, Ahmed and Ahmed,* 14 I&N Dec. 305 (BIA 1973); *Matter of Boghdadi,* 12 I&N Dec. 666 (BIA 1968).

We believe that Congress envisioned the "adoption" provided for in section 101(b)(1)(E) as creating a legal status. We have applied the rules set forth above at least since *Matter of R-, supra,* which was decided two years before the 1957 Amendments[1] which added

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[1] Public Law 85-316; 71 Stat. 639.

to the Act section 101(b)(1)(E) pertaining to adoptions. Moreover, in more than 20 years, and many amendments to the Act, Congress has not reversed our interpretation; instead it has reinforced it. Consider the current provision regarding adoption which is quoted above. It requires that the adoptee must have been "in the legal custody of . . . . the adoptive parent or parents. . . ." If adoption did not create a legal relationship, how could a petitioner prove that he had "legal custody" for two years? Accordingly, we adhere to our previous opinions that an adoption, to be recognized for immigration purposes, must create a legal relationship between the parent and child similar to that between a natural parent and child. *Matter of Benjamin, supra.*

The next question is whether the adoption in this case created the requisite legal relationship under the law of Tonga. We find that it did not. In adjudicating this petition, the Officer-In-Charge sought assistance from the Library of Congress. Mr. Kersi B. Shroff responded on behalf of the Library of Congress. He provided a copy of an opinion in which the Crown Solicitor of Tonga advised that the law of Tonga provides for the adoption of illegitimate children under certain circumstances, but that:

> There is no provision in our law for the adoption of children born legitimately. Nevertheless it has been a common practice in Tonga for relatives to raise and maintain children, including legitimate children as part of the family and to treat them in all respects as if they were legally adopted. Such "adoption" does not give the child any legal right in the estate of the foster parent and

> is not recognized as legally valid under Tongan law.

The petitioner challenges this conclusion as inadequate and not based on the facts in this case. However, it is supported by a source relied upon by the petitioner. *See* I. Brady, *Transactions in Kinship-Adoption and Fosterage in Oceania* (1976). The respondent provided us with a copy of chapter four of that volume: Morton, "Tongan Adoption." Mr. Morton relates that an exchange of children which he calls adoption is a frequent occurrence in Tonga. He explores the circumstances of these exchanges and their social acceptance. However, on page 65 he notes:

> Few applications for legal adoptions are made to the courts because the circumstances of Tongan adoptions are frequently incongruent with the European model of adoption *applied in the courts.* (Emphasis added)

As the respondent has not shown that the Crown Solicitor's opinion is erroneous, we will accept it as valid. Further, we find it inappropriate to recognize for immigration purposes adoptive relationships not legally recognized where they were created.

The burden of proof in visa petition proceedings is upon the petitioner. *Matter of Brantigan,* 11 I&N Dec. 493 (BIA 1966). A petitioner who relies upon foreign law to establish eligibility for an immigration benefit must prove that law as if it were a question of fact.

Matter of Annang, 14 I&N Dec. 502 (BIA 1973). The petitioner has failed to meet his burden in this case. Therefore, despite the equitable factors in this case, we must dismiss the appeal.

ORDER: The appeal is dismissed.

/s/ David L. Milhollan
Chairman

A-25

Decision of The District Director, Immigration and Naturalization Service

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Room 4103 Federal Building
125 South State Street
Salt Lake City, Utah 84138

Refer to this File No.
A21 605 489

Date: 14 Apr 1978

Finau Fatafehi Mila
1494 Richards St.
Salt Lake City, Utah 84115

DECISION

Upon consideration, it is ordered that your *petition to classify status of alien relative for issuance of immi*grant visa be denied for the following reasons:

* * *

Section 203(a)(5) of the Immigration and Nationality Act provides for the granting of preference status to the brothers and sisters of citizens of the United States. Section 101(b)(1)(E) of the Act defines the term "child" to include an adopted child if the child was legally adopted while under the age of fourteen.

The facts presented disclose that the beneficiary was born November 14, 1949 in Tonga to Siale Hala and Seini Hala, who were married in 1946. Siale and Seini

Hala were divorced in 1961. Affidavits submitted show that as of August 1, 1977 both natural parents were still living.

The law of Tonga makes provision for the adoption of illegitimate children. However, no provision is made for the adoption of children born legitimately, and although it is customary for relatives of parents to raise and maintain their children as if the children were adopted, this does not give rise to any legal consequences and the "adoption" is not recognized.

It is therefore concluded that the beneficiary is not entitled to any benefits based on this petition.

Sincerely,

/s/
Acting District Director